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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re PARKER W., a Person Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

STEPHANIE W.,

Defendant and Appellant.

G032135

(Super. Ct. No. DP002500)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Donna L.
Crandall, Judge. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant
and Appellant.

Benjamin P. de Mayo, County Counsel, and Ward Brady, Deputy County
Counsel, for Plaintiff and Respondent.

Janette Freeman Cochran, under appointment by the Court of Appeal, for
the Minor.

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Stephanie W. (the mother) appeals from the juvenile court's denial of her Welfare and Institutions Code section 388 petition¹ to modify dependency orders and return custody of her minor child under family maintenance, or in the alternative, continue reunification services. She alleges the evidence showed both a change in circumstance and that it was in the child's best interest to be returned to her. We disagree and affirm.

I FACTS

Background

In February 2000, an unidentified person found Parker W. on a freeway on-ramp and contacted the police. At the time of this incident, Parker was four years old. When an officer returned Parker to his home, he found the mother under the influence of prescription medication and alcohol. Parker was removed from the home and taken to Orangewood. Shortly thereafter, the Orange County Social Services Agency (SSA) filed a petition pursuant to section 300, alleging the mother failed to protect Parker and caused him serious emotional damage.

This was not the first time SSA had contact with this family. Four other reports of emotional abuse and general neglect had been alleged against the mother and Paul W. (the father) since 1996. Only the first report was unsubstantiated. The second time, Parker was found wandering on the main street of the condominium complex where the family lived. The other two instances, in 1999, involved reports of his witnessing domestic violence. During one of those instances, Parker called 911 after watching his father kick his mother in the stomach. Family maintenance services were provided in 1999, but they proved to be ineffective because the mother and father refused to comply with parental training and counseling.

¹ Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

The mother and father have a history of domestic violence. The mother also has an admitted history of abusing prescription medications. She was diagnosed with bipolar disorder, extreme osteoporosis, and has suffered various other ailments during the last three years² for which her doctors have prescribed medications. In 2000, the mother underwent a medically supervised detoxification program to treat her dependence on opiate painkillers. It appears the mother is currently addicted to Xanax, a narcotic used to partially treat her bipolar disorder, and she experiences seizures if she misses a dose.

At the dispositional hearing, Parker was declared a dependent child and placed in foster care. He was eventually placed with his maternal grandmother, first in California, and subsequently at her home in Texas. By the six-month review both parents had completed parenting classes and were attending therapy. Both tested negative for alcohol, although the mother tested positive for prescription medication. Before the hearing there was an incident of domestic violence between the parties in which the mother suffered two broken ribs and a broken coccyx. SSA recommended that Parker remain a dependent of the juvenile court while the parents continued family reunification services, and the case was set for a 12-month review.

Prior to the 12-month review, Parker was placed with his mother for a 60-day trial visit in the family home. The father filed for divorce and was living elsewhere at the time. This visit ended when the mother, after picking Parker up from school, stopped her car in the middle of a busy street and “went catatonic.” She was taken to the hospital on a mental health hold under section 5150,³ where she tested positive for

² For example, the mother has taken prescription medication for a broken shoulder, a raccoon bite, endometriosis, migraines, chronic sinusitis, depression/anxiety and general joint pain from lifting her son.

³ Section 5150 states, “When any person, as a result of mental disorder, is a danger to others, or to himself or herself, . . . a peace officer, . . . may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated

amphetamines, and Parker was again removed from the home. The mother claims the incident was due to negative effects of Paxil, an antidepressant she was taking. SSA's report noted the mother claimed to be experiencing panic attacks while working with an aide (assigned by SSA) on organizing the family home. SSA also found that Parker had been sleeping in his mother's room, against the social worker's advice. His room was too cluttered for a new bed to be delivered. The mother's therapist also reported concern because she was not taking her bipolar medication, but instead stockpiling the drugs.

The 12-month review took place in May 2001. Initially, SSA recommended reunification services be terminated and the case set for a permanency hearing. However, SSA changed its position, recommending the matter be set for an 18-month review. This change was partly due to a letter sent by the mother's psychiatrist indicating that the mother was making improvements and was "more stable than she[] [had] ever seen her." The court set the 18-month review for August 2001, finding that there was a substantial probability the minor would be returned to his mother at that time.

In June 2001, the child was again placed in his mother's care for a trial visit. The parties entered into a stipulation at the 18-month review to leave Parker in his mother's care, continue reunification services, and set the case for another review in six months. That review never occurred, however, because the trial visit ended in December 2001, when Parker called 911 because his mother was fighting with a neighbor. The police found the mother belligerent, intoxicated, and possibly under the influence of prescription medication. The home was unsuitable for living due to the presence of "large amounts of trash, rotten food, and insects." Parker was dirty, had access to an open bottle of Southern Comfort, a large kitchen knife and numerous medications that were laying out in the open. He was responsible for making his own breakfast. Again,

by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation."

Parker was removed from the home and taken to Orangewood. Again, the mother was held under section 5150.

As a result of this incident, the agency filed a supplemental petition for more restrictive placement to which both parents pled no contest. SSA's report noted that while the mother was cooperative and maintained almost daily telephonic contact with Parker, she was unable to safely care for him due to domestic violence, use of alcohol, and mental illness. The report recommended against family reunification and that Parker be placed with his maternal grandmother in Texas. These recommendations were adopted at the disposition hearing in April 2002. The court then set a section 366.26 hearing for August 2002 and ordered a bonding study.

The bonding study showed "closeness of attachment, interactive play, tactile contact . . . positive affect and emotion" between Parker and his mother. It showed Parker and his grandmother were "developing [a] bond with moderate intensity."

Sections 366.26 and 388 hearings

The mother filed a section 388 petition on the eve of the section 366.26 hearing requesting Parker's return under family maintenance, or in the alternative, continued reunification services. The hearings were trailed and continued, and eventually heard in March 2003. The court heard the section 388 petition first.

Several witnesses testified as to the mother's changed circumstances. The mother's psychiatrist, Susan Zachariah, testified that the mother's mood had been stable for at least a year. While she was aware of the mother's previous addiction to prescription medications, she did not know the mother had a problem with alcohol. She also testified that she thought the father was supportive of the mother. The mother's therapist, Renee Alpert, testified the mother had "largely" achieved her therapy goals of depressing negative thinking, emotionally stabilizing and increasing her parenting skills. The mother was learning how to take better care of Parker through the use of "time-outs"

and reinforcing positive behavior. She testified the mother showed an improved ability to make thoughtful decisions, and was no longer acting rashly. Alpert opined that the mother had finally learned to take responsibility for her actions and was capable of taking care of Parker. However, Alpert was unaware that Parker was living with his grandmother during much of the time she and the mother were working on parenting skills. Also, like Zachariah, Alpert was unaware of the mother's problem with alcohol.

The mother had been attending Alcoholics Anonymous (AA) meetings three to four times each week for the previous 10 months and had been sober since April 25, 2002. She was working through the 12-step program with her sponsor, and was on step four at the time of the hearing. She was also meeting with her sponsor once a week, and talking to her on the phone every day. The mother testified that she had stabilized her bipolar condition through proper medication. She said she would be able to care for Parker this time because she learned how to deal with her alcohol addiction and she knew she could not let the "pressure build up." Although the mother indicated she was tested for drugs twice weekly, there was some confusion about how many of these tests were negative.

The father had completed a year of domestic violence training, but the mother repeatedly denied that domestic violence was part of the reason Parker was removed from the home. It was unclear when the last incident of domestic violence occurred. Although the mother denied it, both her therapist and her AA sponsor testified that her shoulder was broken in January 2001. She did not attend the domestic violence women's group recommended by the social worker after this alleged incident of domestic violence.

At the time of the hearing, the mother and father continued to see each other almost every day, though they were not living together. The father continued to provide some transportation and some financial support to the mother. The balance of her income came from disability payments.

From this evidence, the court found the mother had indeed changed her circumstances, but determined it would not be in Parker's best interest to be returned to her. Following the section 366.26 hearing, the court found the "benefit" exception to the termination of parental rights under section 366.26, subdivision (c)(1)(A) applied to the mother and ordered legal custody of Parker to the grandmother. Dependency jurisdiction was terminated.

II

DISCUSSION

Appealability

As a preliminary matter, SSA argues the mother cannot appeal the section 388 order because she did not also appeal the section 366.26 ruling. This argument has no merit.

SSA relies on *In re Jessica K.* (2000) 79 Cal.App.4th 1313 to support its claim. In that case, the juvenile court terminated parental rights after denying the mother's section 388 petition. The mother appealed the denial of the petition but not the termination of parental rights. The appellate court dismissed her appeal since her parental rights could not be restored even if the trial court abused discretion by denying the petition. The court had no authority to modify or set aside the termination of parental rights without a proper appeal. (*Id.* at pp. 1316-1317; Welf. & Inst. Code, § 366.26, subd. (i).) Therefore, a hearing on the section 388 petition would have been futile. (*In re Jessica K.*, *supra*, 79 Cal.App.4th at pp. 1316-1317.)

That is not the case here. The outcome of the permanency hearing was not termination of parental rights, but the establishment of a guardianship. The juvenile court retains jurisdiction over a guardianship that arises out of a section 366.26 hearing, even after dependency jurisdiction is dismissed. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 300, fn. 4.) The court retains the ability to vacate its order dismissing dependency jurisdiction over the child. (§ 366.4, subd. (a).)

SSA recently drew our attention to *In re Albert G.*, (Nov. 7, 2003, B162016) ___ Cal.App.4th ___ [2003 WL 22520418], which generally affirms the principles set forth in *In re Jessica K.* For the same reasons as indicated above, *In re Albert G.* does not require dismissal of the mother's appeal in this case.

Section 388 petition

The mother appeals from the denial of her section 388 petition to modify the court's order of April 2002, terminating reunification services and setting a section 366.26 hearing. We review section 388 petitions for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Therefore, we will not disturb the trial court's decision unless the court ""has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."" [Citations.]” (*Ibid.*)

In pertinent part, section 388, subdivision (a) provides: “Any parent or other person having an interest in a [dependent] child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order [the] court previously made” The moving party bears the burden of proving both a change in circumstances and that a change in the prior order would be in the child's best interest. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Factors to consider when determining a child's best interest are: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

It is clear that when a section 388 petition is filed after reunification services have been terminated and a section 366.26 hearing has been set, the primary focus for determining the child's best interests should be on the child's need for

permanency and stability. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) “[T]he parents’ interest in the care, custody and companionship of the child are no longer paramount.” (*Ibid.*)

The mother argues the juvenile court should be reversed because she met the burden of showing that changing the order would be in Parker’s best interests. She makes an alternative argument for a remand, contending the juvenile court did not make findings regarding the three *Kimberly F.* factors and this “severely hampered [mother’s] ability to present a cogent and cohesive argument on appeal.” We disagree with both contentions. The juvenile court did address each of the *Kimberly F.* factors as discussed below, and as a result, did not abuse its discretion in denying the petition.

Parker was initially removed from the home for several reasons: domestic violence, the mother’s inability to supervise, mood instability, problems with use of alcohol, prescription medication, over the counter medication, and an unclean home. The problems that led to the dependency might be considered “moderate” when compared to the extremes: the sole issue of a dirty house in *In re Kimberly F.*, *supra*, 56 Cal.App.4th 519, and the serious physical abuse that occurred in *In re Stephanie M.*, *supra*, 7 Cal.4th 295. Regardless, the mother was still required to show that it would be in Parker’s best interests to be returned to her.

The mother had been sober for 10 months and was attending AA. The testimony of the psychiatrist, therapist, and AA sponsor demonstrated that the mother had made progress in dealing with her prescription medication addiction, although she was still taking prescription medications for bipolar disorder. It is unclear how many of the mother’s drug tests were clean. Her bipolar condition seemed stable and she was accepting help in keeping her house clean. The juvenile court recognized that the mother had “made concerted efforts to address the issues which took Parker away initially.” It also noted, however, that she still had to deal with her bipolar disorder, osteoporosis and reliance on the father, with whom there was a history of domestic violence.

The strength of the bond between Parker and his mother, and the bond between Parker and his grandmother has not been a real issue in this case. There is little doubt that at the time the bonding study was conducted, approximately nine months before the section 388 hearing, Parker had a stronger bond with his mother than with his grandmother. Even at the time of the hearing, he called his mother almost every day. The court recognized the existence of this bond, and that there was no question the mother and Parker loved each other “beyond belief.” However, the bonding study showed a bond between him and his grandmother as well. This was a “developing bond with moderate intensity.”

The juvenile court also analyzed the “degree to which the problem may be easily removed . . . and the degree to which it actually has been.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) It considered the history of the case and the fact that the mother continued to deal with bipolar disorder, osteoporosis and was still dependent on her previously abusive husband for financial support and transportation. These problems may not be so easily removed.

Since Parker’s initial removal, there have been two unsuccessful attempts to return him to the mother’s custody. Trial visits took place in December 2000 and June 2001. Before each trial visit, the mother was complying with the SSA’s reunification plan. Yet each time she was unable to maintain the stability she needed to properly care for Parker. The mother has made much progress considering reunification services were terminated in April 2002. She has been sober since April 2002 and has regularly attended AA meetings. The psychiatrist and therapist testified the mother was stable and would be able to care for Parker. Yet, neither was aware of the mother’s alcoholism, which has played a major role in her battle to regain custody of her son.

By the late date of the section 388 hearing, the “need for continuity and stability assume[d] an increasingly important role” in determining where Parker would be placed. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.) This need properly dictated the

conclusion that his best interest lay in maintaining his current arrangement, living with the grandmother. (*Id.* at pp. 317-318.) At the time of the hearing Parker had been living with her for over one year. The bonding study showed that they were increasingly developing a bond. He was doing well in school, liked his teacher and had made friends in Texas. In the two years prior to this placement, Parker was moved from his mother's home, to Orangewood, to foster parents, to his grandmother and back again. His life lacked stability. The court was also concerned that Parker would become the parent in the relationship, given that he had previously called 911. The court recognized the strides the mother made, and found that she had changed her circumstances. It did not find that it would be in Parker's best interest to be returned to her.

Taking into consideration the factors set forth in *Kimberly F.*, as well as Parker's need for permanency and stability, the juvenile court acted well within its discretion in denying the mother's section 388 petition for modification.

III

DISPOSITION

The court's order denying the mother's section 388 petition is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.